SENTENCING MEMORANDUM
FROM: Dave

DATE: Sept 21st (Tuesday)
TIME:
PLACE:

Criminal Case No.
Now is the time set for the sentencing of _____

CASE HISTORY

[ ] [On **March 15, 1996,**] [a jury returned a verdict finding the defendant guilty of Count(s) _____ of the Indictment] [the defendant entered a plea of guilty to Count(s) _____ of the Indictment]

LITANY FOR DIFFERENT TYPES OF PLEA AGREEMENTS

[ ] ***[Applicable only for a pure Rule 11(e)(1)(A) Plea Agreement]*** [1]

The Plea Agreement in this case contained an agreement [to dismiss certain Count(s)] [and] [not to pursue potential charges] pursuant to Rule 11(e)(1)(A). [At the conclusion of the plea hearing the Government made a motion to dismiss the Count(s) which the Court took under advisement.] [Does the Government intend to make that motion at this time?]The Court is required by Sentencing Guideline §6B1.1(c) to defer acceptance of the Plea Agreement until the Court reviews the presentence report. The Court has now reviewed the report and the entire record.

[ ] ***[if the Court accepts the agreement]*** On the basis of that review, the Court finds, pursuant to Sentencing Guideline §6B1.2, that the remaining charges

[1] A pure Rule 11(e)(1)(A) Plea Agreement contains an agreement to dismiss counts and/or not to pursue potential charges but contains neither a recommended nor a binding sentence.

adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines. The Court therefore [grants the Government's Motion to Dismiss Count(s) ____] [and] accepts the Plea Agreement.

[ ] ***[if the Court rejects the agreement]*** On the basis of that review, the Court finds, pursuant to Sentencing Guideline §6B1.2 [that the remaining charges **do not** adequately reflect the seriousness of the actual offense behavior] [and] [that accepting the agreement **will undermine** the statutory purposes of sentencing or the Sentencing Guidelines for the following reasons: ***[insert reasons].***

[ ] Having rejected the agreement, the Court must now give you the opportunity to withdraw you plea of guilty. Do you wish to withdraw your plea?

[ ] ***[if yes]*** The Clerk shall reset this matter for trial and this hearing is adjourned.

[ ] ***[if no]*** Have you had time to discuss this with your attorney? Have you received any threats or coercion? Has anyone made any promise or prediction to you as to what your sentence will be?

[assuming answers are negative, then continue]

The Court finds your decision today to not withdraw your guilty plea is your free and voluntary decision.

The Court has already found that your original

decision to plea guilty was your free and voluntary decision, and accepted your plea(s) of guilty. I now reaffirm my acceptance of your guilty plea(s) to count(s) _____. We will now continue on with the sentencing portion of this case.

[ ] ***[Applicable only for a pure Rule 11(e)(1)(B) Plea Agreement]*** [2]

The Court accepted the Defendant's plea of guilty on _____ and ordered that a presentence report be prepared. The pre-sentence report has been completed and provided to counsel and the court.

[ ] ***[Applicable only for a mixed Rule 11(e)(1)(A) & (B) Plea Agreement]*** [3]

The Plea Agreement in this case contained an agreement [to dismiss certain count(s)] [and] [not to pursue potential charges] pursuant to Rule 11(e)(1)(A). [At the conclusion of the plea hearing the Government made a motion to dismiss the count(s) which the Court took under advisement.] [Does the Government intend to make that motion at this time?] The Court is required by Sentencing Guideline §6B1.1© to defer acceptance of the Plea Agreement until the Court reviews the presentence report. The Court has now reviewed the report and the entire record.

[ ] ***[if the Court accepts the agreement]*** On the basis of that review, the Court finds, pursuant to Guideline §6B1.2, that [the remaining charges adequately

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[2] A pure Rule 11(e)(1)(B) Plea Agreement contains a recommended sentence but no binding sentence, no dismissal of charges, and no agreement not to pursue potential charges.

[3] A mixed Rule 11(e)(1)(A) & (B) Plea Agreement contains a recommended -- not binding -- sentence and an agreement to dismiss counts and/or an agreement not to pursue potential charges.

reflect the seriousness of the actual offense behavior] [and that] accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines. The Court therefore [grants the Government's Motion to Dismiss Count(s) _____] [and] accepts the Plea Agreement.

[ ] ***[if the Court rejects the agreement]*** ***[insert paragraphs from pure Rule 11(e)(1)(A) litany]***

[ ] ***[Applicable only for a Rule 11(e)(1)(C) Plea Agreement]*** [4]

The Plea Agreement in this case contained a provision for a sentence that was intended to be binding on the Court pursuant to Rule 11(e)(1)(C). Accordingly, the Court reserved ruling on whether it would accept the defendant's plea until the Court could review the presentence report. The Court instructed the defendant at the plea hearing that if the Court rejected the agreement, the Court would give the defendant an opportunity to withdraw his/her plea. The Court has now reviewed the presentence report, and based on that review, the Court finds that:

[ ] ***[If Court decides to agree to the specific sentence]*** Pursuant to Sentencing Guideline §6B1.2(c), [the agreed sentence is within the applicable guideline range] [or] [the agreed sentence departs from the applicable guideline range for justifiable reasons]. The Court hereby accepts the agreement of the parties on the specific sentence as contained in the Plea Agreement. Having already found in the previous Plea Hearing that your plea of guilty was free and

[4] A Rule 11(e)(1)(C) Plea Agreement contains an agreement on a specific sentence that is intended by the parties to be binding on the Court. It may also contain an agreement to dismiss counts and/or an agreement not to pursue potential charges.

voluntary, I now accept your plea of guilty to count(s) _____. ***[proceed next to the "Sentencing" section of this litany]***

[ ] ***[Insert litany paragraphs from the Rule 11(e)(1)(A) section if the binding plea agreement includes an agreement to dismiss certain counts and/or an agreement not to pursue potential charges.]***

[ ] ***[If Court decides to reject the agreement as to the specific sentence]*** The Court hereby rejects the agreement of the parties on the appropriate sentence contained in the Plea Agreement because: ***[insert reasons]*** [5] In light of these findings, the Court will now give the defendant an opportunity to withdraw his/her plea of guilty. Before you make this decision, the Court must first advise you of the consequences of your decision. ***[insert here all the paragraphs from the Plea Litany that are labeled "not applicable to Rule 11(e)(1)(C) Plea Agreements"]*** Do you wish to withdraw your plea?

> **[ ]** ***[If plea is not withdrawn]*** Have you had time to discuss this matter with your counsel? Have you been subjected to any threats or coercion? Has anyone made any promises or prediction to you as to what your sentence will be? ***[assuming answers are "no" then continue]*** The Court finds on the basis of the proceedings today that your decision to not withdraw your guilty plea is your free and voluntary decision; that your plea of guilty is

[5] See Sentencing Guideline §6B1.2(c) for reasons to accept or reject Rule 11(e)(1)(C) Plea Agreement.

likewise free and voluntary; and I hereby accept your plea of guilty to count(s) ____ of the Indictment. We will now continue on with the sentencing portion of this case.

[ ] ***[If plea is withdrawn]*** Because you have decided to withdraw your plea, this sentencing hearing is over, and the Clerk is directed to meet with counsel and set a new trial date in accord with the Speedy Trial Act.

TENTATIVE FINDINGS

[ ] Has the defendant had an opportunity to read the Presentence Investigation Report? [6]

[ ] Counsel, have you had an opportunity to review the Presentence Report with your client?

[ ] Has the Government had an opportunity to review the presentence report?

[ ] [The Court recognizes that the Government *[has filed] [has indicated that it may move later in this hearing for]* a downward departure under §5K1.1 for the Defendant's substantial assistance. The Court will address that issue later in these proceedings. Without consideration of that motion, the tentative findings of the Court are as follows:

Statutory Mandatory Minimum: [7]

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[6] The 9th Circuit requires strict adherence to the requirement that a presentence report be prepared. U.S. v. Turner, 905 F.2d 300 (9th Cir. 1990). This case reversed a district court for failing to have an updated presentence report prepared even when the Defendant waived his right to have a presentence report and he had been in jail since an earlier report was done. But note that the defendant can waive the requirement that he be given 10 days to read the report. See, 18 U.S.C. §3552(d).

[7] Where a statue provides for a mandatory minimum sentence, and that minimum sentence is above the highest end of the Guideline range, the mandatory minimum must be applied. *See, Guideline § 5G1.1(b).*

Statutorily Authorized Maximum: [8]

Total Combined Offense Level:

Criminal History Category: (___ criminal history points).

Guideline Imprisonment Range: The Guideline range is ___ to ___ months.

Supervised Release:

Probation:

Fine: $_____ to $_____

Restitution Amount: $_____ [9]

$_____ special assessment.[10]

There are 2 ways a defendant can get around a statutory mandatory minimum. First, he can qualify under the "safety valve" provisions of 18 U.S.C. § 3553(f); and secondly, he can provide substantial assistance to the Government who can move under 18 U.S.C. § 3553(e) to avoid the mandatory minimum. The safety valve provision allows the Court to disregard the statutory minimum in sentencing first time, nonviolent drug offenders who played a minor role in the offense and who have made a good-faith effort to cooperate with the Government. *U.S. v. Sherpa*, 110 F.3d 656 (9th Cir. 1996). The defendant has the burden of proving that he qualifies for the safety valve. *U.S. v. Ajugwo*, 82 F.3d 925 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 742 (1997). The burden is met by preponderance of evidence. *Id.* The 9th Circuit has also held that although persisting in a not guilty plea and going to trial will preclude a decrease in the offense level for acceptance of responsibility, it does not preclude safety valve sentencing. *U.S. v. Shrestha*, 86 F.3d 935 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 375 (1997). Requiring the defendant to disclose information to qualify for safety valve does not violate defendant's Fifth Amendment rights. *U.S. v. Washman*, 128 F.3d 1305 (9th Cir. 1997). Once the Court has determined that the criteria for the safety valve have been met, application is not discretionary and the court must sentence without regard to statutory minimum sentences. *U.S. v. Hernandez*, 90 F.3d 356 (9th Cir. 1996).

When a defendant provides substantial assistance, the Government will commonly move under § 3553(e) to avoid the mandatory minimum and apply the Guideline range, and will also move under § 5K1.1 to get a downward departure below the otherwise applicable Guideline range. The Supreme Court requires separate motions under § 3553(3) and § 5K1.1. *U.S. v. Melendez*, 116 S.Ct. 2057 (1996).

[8] When the statutorily authorized maximum sentence is less than the minimum of the Guideline range, the statutorily authorized maximum sentence shall be the Guideline sentence. *See, Guideline § 5G1.1(a).*

[9] The Mandatory Victims Restitution Act of 1996 (18 U.S.C. § 3663A--3664) does not violate the 5th, 7th, or 8th Amendments to the Constitution. *U.S. v. Dubose*, 1998 WL 338016 (9th Cir. June 26, 1998).

[10] The Special Assessment is $100 for crimes committed after April 24, 1996, and is $50 for crimes committed before that date. *See*, Mandatory Victim Restitution Act of 1996, 18 U.S.C. § 3663A--3664. There is a separate Special Assessment for each count Defendant is sentenced upon -- two counts, $200; three counts, $300; etc.

DISCUSSION OF OBJECTIONS

[ ] The Government [has not] [has] filed any objection to the presentence report.

[ ] The defendant [has not] [has] filed written objections to the presentence report.

[ ] At this time, the Court will hear any evidence or argument which the Government may wish to submit regarding guideline or departure issues, or concerning its sentencing recommendations in this matter. [11]

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[11] In *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), the Supreme Court held that the 5th and 6th Amendments require that any fact that increases the penalty for a crime beyond a prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. The 9th Circuit applied *Apprendi* to a drug conviction in *U.S. v. Nordby*, 2000 WL 1277211 (9th Cir. Sept. 11, 2000). There, the Circuit held that the District Court could not rely on findings in the presentence report on the quantity of drugs, but had to submit that issue to the jury or, in the absence of a jury finding, sentence on the assumption that the jury found the minimum amount for conviction. In sentencing, the Government generally bears the burden of proving aggravating factors; the defendant bears the burden of proving mitigating factors. *U.S. v. Barnes,* 993 F.2d 680 (9th Cir. 1993). In addition, the Government bears the burden of presenting evidence to the Court sufficient to enable the Court to determine the base offense level. *U.S. v. Harrison-Philpot*, 978 F.2d 1520 (9th Cir. 1992). Under that case, the Government has the burden of showing the quantity of drugs involved for Guideline purposes by a preponderance of the evidence, *id. at 1524,* although that only applies to a plea since *Nordby*, discussed above. Likewise, the Guideline statement that the amount of the drugs may be approximated would also appear now to apply only to a plea situation. *Guideline § 2D1.1, Application Note 12; U.S. v. August*, 86 F.3d 151, 154 (9th Cir. 1996). But the Government must prove that the defendant "is more likely than not actually responsible for" the quantities alleged. *Id.* While the Government can rely on circumstantial evidence, it has not carried its burden by producing the affidavits of two FBI officers who testify about what generally is found in the typical drug case. *U.S. v. Dudden*, 65 F.3d 1461, 1471 (9th Cir. 1995). The Court is allowed to adopt the factual statements in the Presentence Report if there is no challenge by the defendant. *U.S. v. Scrivner*, 114 F.3d 964, 967 (9th Cir. 1997). Even if the defendant says he did not make the statements attributed to him in the presentence report, the Court could adopt those statements if the information bears some indicia of reliability. *U.S. v. Houston*, 2000 WL 873793 (9th Cir. July 5, 2000) (this once again only applies to a plea situation if the statements attributed to the defendant would enhance his sentence). In resolving disputes, § 6A1.3 of the Guidelines allows the Court to consider relevant information without regard to its admissibility under the rules of evidence provided that the information "has sufficient indicia of reliability to support its probable accuracy." The 9th Circuit is very skeptical of accomplice hearsay, and has reversed at least one district court for relying on accomplice hearsay in a presentence report. *U.S. v. Corral*, 172 F.3d 714 (9th Cir. 1999). Note that in a conspiracy, "each conspirator is to be judged on the basis of the quantity of drugs which he reasonably foresaw or which fell within the scope of his particular agreement with the conspirators, rather than on the distribution made by the entire conspiracy." *U.S. v. Whitecotton*, 1998 WL 205416 (9th Cir. April 29, 1998). Note that the Court cannot hold it against defendant that he refused to testify at the sentencing hearing, because the defendant does not waive his 5th

[ ] At this time, the Court will hear any evidence or argument which counsel for the defendant may wish to submit regarding guideline or departure issues, or concerning their sentencing recommendations in this matter.

[ ] Does the defendant wish to speak on his own behalf regarding the sentencing in these matters?

RULINGS ON OBJECTIONS [12]

1. Paragraph of the Report:

[ ]

2. Paragraph of the Report:

[ ]

3. Role in the Offense -- Mitigating Role

[ ] Defendant seeks a further reduction in the offense level for his role in the offense. Under Guideline §3B1.2(a), the defendant is entitled to a 4 level reduction if he was a "minimal participant" in the offense. Under subsection (b), he is entitled to a 2 level reduction if he was a "minor participant" in the offense. The Presentence Report recommends that [ ].

A "minimal participant" -- according to the Application Notes -- is one who is "plainly among the least culpable of those involved in the conduct of the group." The Application

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Amendment rights by pleading guilty. *Mitchell v. U.S.*, 119 S.Ct. 1307 (1999),

[12] The 9th Circuit has adopted a bright-line rule requiring the court to disavow reliance on disputed factors at the time of sentencing. The Judge cannot simply file a subsequent order stating that the disputed allegations were not relied on in imposing sentence. *U.S. v. Fernandez-Angulo,* 897 F.2d 1514 (9th Cir. 1990) (en banc).

Notes also state that a downward adjustment for a minimal participant "will be used infrequently" in cases where the defendant did nothing more than "offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs."

The Application Notes define a "minor participant" as one who "is less culpable than most other participants, but whose role could not be described as minimal."

Where the Defendant's role in the offense falls somewhere between being a "minimal participant" and being a "minor participant," the Defendant is to receive a 3 level reduction according to Guideline §3B1.2.

The 9th Circuit has held that with regard to both a "minimal" and a "minor" participant, the Court must assess the conduct of the defendant against that of his co-participants and <u>not</u> against that of the hypothetical average participant in the type of crime involved. *U.S. v. Benitez,* 34 F.3d 1489, 1498 (9th Cir. 1994).

In this case, the Court finds that [ ].

<u>4. Role in the Offense -- Aggravating Role under § 3B1.1:</u>

[ ] Under § 3B1.1 of the Guidelines, the defendant's offense level increases if he played an aggravating role in the offense. The enhancement depends in large part on the defendant's leadership or supervisory role in the offense, and on how many others were involved. While an enhancement under § 3B1.1(a) or (b) is proper only in a criminal activity involving more than 5 participants, there is no requirement that the defendant *exercise authority over* at least 5 participants before the enhancement can be applied. *U.S. v. Barnes*,

993 F.2d 680, 685 (9th Cir. 1993). Instead, the enhancement under (a) or (b) applies if defendant exercised authority over at least one other person who was responsible for the commission of the offense. *Id; U.S. v. Helmy,* 951 F.2d 988, 997 (9th Cir. 1991). This will ensure that there will be no enhancement for the defendant who had the most subordinate role in a criminal activity merely because that person ordered supplies or directed the actions of unwitting outsiders. *Helmy,* 951 F.2d at 997. More than one person can qualify as a leader under any of the subsections. *Barnes*, 993 F. 2d at 685.

The Guidelines set forth the following factors for distinguishing a leadership and organizational role under (a) from a role of mere management or supervision under (b):

> **"The exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others."**

The 9th Circuit has found that a defendant was an organizer or leader under (a) when he was the main negotiator for the other participants; he handled the buy money; he had an assistant whom he directed to do various tasks; and he traveled between states to further the offense. *Barnes*, 993 F. 2d at 685.

_____A district court erred in finding that a defendant was a leader because without his translation skills (from Spanish to English) the deals "would not have gone down." This essentially imposed a but-for test, which is improper. The proper test is whether the defendant "exercised some control over others involved in commission of the offense [or was]

responsible for organizing others for the purpose of carrying out the crime." *U.S. v. Lopez-Sandoval*, 1998 WL 309924 (9th Cir. June 15, 1998).

A 4-level enhancement under §3B1.1 was reversed even though the defendant was the sole negotiator regarding the quantity and price of the cocaine, he negotiated a $1,000 fee for each kilogram of cocaine he delivered, he was the only member of the conspiracy who met face to face with the undercover detective, and he drove to various locations to obtain the cocaine and then transported it to the site of the drug transaction. The 9th Circuit found 4 levels too much because there "was no evidence in the record that [the defendant] exercised any control or organizational authority over others and thus no factual basis existed for characterizing him as an organizer or leader." *U.S. v. Avila*, 95 F.3d 887, 890 (9th Cir. 1996).

_____In this case, the Court finds [ ].

7. Statutory Mandatory Minimum:

[ ] [The Government has moved under 18 U.S.C. § 3553(e) to avoid the statutory mandatory minimum sentence in this case. The Government bases its motion on the substantial assistance of the defendant. The Court agrees and will grant the motion. The statutory mandatory minimum is therefore inapplicable, and the Court will apply the Guidelines, and specifically apply the range discussed earlier in the Court's tentative findings.]

[The Government has not moved under 18 U.S.C. § 3553(e) to avoid the statutory mandatory minimums but the Court has the authority to do so on its own pursuant to 18

U.S.C. § 3553(f) and § 5C1.2 of the Guidelines. This is known as the "safety valve" provision. The Court finds [*cannot find*] that the requirements of § 5C1.2 are satisfied in this case. [*list requirements and findings on them*].

7. Downward Departure Under § 5K1.1:

[ ] The Government has moved under § 5K1.1 for a downward departure based on the defendant's substantial assistance. [The plea bargain agreement provides that the Government will recommend that the Court depart downward to a sentencing range of __ to __ years.] The court recognizes that it is not bound by the recommendation, and that a § 5K1.1 motion gives the Court authority to depart downward to an even greater extent than recommended by the Government. *U.S. v. Udo,* 963 F.2d 1318, 1319 (9th Cir. 1992).

[The Court finds that the Government's motion is well-taken as defendant appears to have provided substantial assistance. The Court will therefore grant the motion.]

In determining how far to downward depart, the Court may consider the significance and extent of Defendant's assistance and the timeliness of that assistance. [13] After considering these factors, the Court finds that a reduction of ___ levels in the offense level is appropriate. The new offense level is therefore ___. The Guideline range for an offense level of __ with a criminal history category of __ is ____ months to ____ months.

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[13] Judge Winmill's basic policy is that when a defendant provides information that takes down a conspiracy, or jails major players, or puts himself in danger, he is entitled to a reduction around 50% of the original Guideline range. For lesser assistance, the Judge will not use a percentage method but will instead find an analog in the Guidelines. For example, the Judge may reduce the offense level by 3 because defendant's assistance is akin to acceptance of responsibility. Nevertheless, each case is judged on its own merits.

9. Downward Departure Pursuant to §5K2.0:

[ ] The Defendant requests a downward departure pursuant to §5K2.0 on the basis of [discuss basis] [victims conduct -- §5K2.10] [coercion -- §5K2.12] [diminished capacity -- §5K2.13] [(other factors)].

The Supreme Court in the *Koon* decision set out a 4-part test for resolving requests for downward departures under §5K2.0. This test may be summarized as requiring the Court to first identify what features of this case, potentially, take it outside the Guidelines' "heartland" and make it a special or unusual case? The Court must then determine whether the Guidelines forbid, encourage, or discourage departures based on those features?[14]

If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable guideline does not already take it into account. If the special factor is a

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[14] [*This footnote may be in need of amendment because the Sentencing Commission is drafting an amendment, as of April 20, 2000, that would preclude any departure for post-conviction rehabilitation].* Defendants are requesting § 5K2 downward departures on the basis of post-offense rehabilitation. The 9th Circuit has held that post-*sentencing* rehabilitation may provide grounds for a § 5K2 downward departure on a resentencing. *U.S. v. Green*, 152 F.3d 1202 (1998). In that case, the Circuit stated that several other circuits had held that post-*offense* rehabilitation may provides grounds for a downward departure, and then stated that "we cannot ascertain any meaningful distinction between post-offense and post-sentencing rehabilitation." *Id.* at 1207. *Green* suggests that the rehabilitative efforts must be "exceptional" to qualify for the downward departure. *Id.* at 1208. This would appear to be a requirement. Under *Koon*, a factor already considered in the Guidelines may provide a basis for a further departure only if it is present to an exceptional degree. *Koon v. U.S.*, 518 U.S. 81, 96 (1996). A defendant's "rehabilitative efforts" have been taken into account by the Sentencing Commission as an appropriate consideration in determining whether a defendant has accepted responsibility for purposes of a two-or three-level departure under § 3E1.1. *See* U.S.S.G. § 3E1.1, comment. (n.1(g)) (listing "post-offense rehabilitative efforts" as a potential factor in deciding entitlement to a downward departure under § 3E1.1); *see also U.S. v. Miller,* 991 F.2d 552, 554 (9th Cir. 1993). Thus, because the rehabilitative efforts of the defendant have already been taken into account, the defendant must demonstrate an exceptional degree of rehabilitation to warrant a downward departure. On another subject, note that family and community ties and cultural assimilation are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. U.S.S.G. § 5H1.6. But under § 5K2.0, if the family or community ties, or the cultural assimilation, are sufficiently unusual or extraordinary to warrant departure, a district court has the discretion to downward depart. *See, U.S. v. Lipman*, 1998 WL 3584 (Jan. 8, 1998).

discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the Court should depart only if the factor is present to an exceptional degree or is some other way makes the case different from the ordinary case where the factor is present. If the special factor is unmentioned in the Guidelines, the Court must decide whether it is sufficient to take the case out of the Guideline's heartland, recognizing that departures based on grounds not mentioned in the Guideline will be highly infrequent. *Id.*

Evaluating this case under the 4-part *Koon* test, the Court reaches the following conclusions: [ ]

4. Upward Departure

_____The same factors apply -- 4-part Koon test -- as with downward departure. *See, U.S. v. Sablan,* 114 F.3d 913 (9th Cir. 1997) *(en banc), cert. denied,* 118 S.Ct. 851 (1998). The extent of an upward departure no longer requires the district court to make a comparison to analogous Guideline provisions so long as the court sets out findings justifying the magnitude of its decision to depart and extent of departure and that explanation is not unreasonable. *Id.*

_____Uncharged or dismissed conduct, in the context of a plea agreement, cannot be used to depart upward under § 5K2. For example, if a defendant pleas guilty to 2 counts in a 5 count indictment, with an agreement that the Government will dismiss the other 3 counts, the court cannot use the dismissed 3 counts to upward depart. *U.S. v. Lawton* 1999 WL 754278 (Sept. 27, 1999 9th Cir.)(Idaho).

[*Remember – the defendant is entitled to advance notice if the Court is considering departing upward. See Footnote 16*]

5. Armed Career Criminal

_____Under Guideline § 4B1.4, the defendant may be sentenced as an Armed Career Criminal. This will add to the offense level when (1) the defendant is 18 at the time of the crime; (2) was charged with a qualifying felony; and (3) has had at least 3 prior qualifying felonies. In determining whether past felonies are "qualifying," the Court must examine the statutes of conviction or certified copies of conviction before imposing the enhancement. *U.S. v. Matthews, 2000 WL 1289763 (9th Cir. Sept. 14, 2000).*

5. Conclusion on Objections.

[ ] The court has considered any objections stated by counsel, along with the response to those objections included in the addendum to the presentence report submitted by Probation Officer _____. The court concludes that, except as otherwise indicated in my comments and findings here today, the addendum adequately addresses the concerns and objections of counsel and is adopted by the court as its own response to any such objections.

[ ] Except as otherwise indicated in my comments and findings here today, or where I have determined that the matter objected to will not be taken into account in sentencing, the Court finds all facts contained in the Presentence Report and Addendum to the Report to be true and accurate. The Court adopts the recommended guideline range of ___ to ___ months as reasonably addressing the totality of the defendant's criminal conduct based upon an offense level of ____ and a criminal history category of ____.

SENTENCING

[ ] Will the defendant please stand for sentencing.

[ ] _____, having [pled guilty to count(s) _____ of the Indictment] [been found guilty by a jury of count(s) _____ contained in the Indictment], and the court being satisfied that you are guilty as charged, the Court hereby ORDERS and ADJUDGES as follows:

TERM OF IMPRISONMENT OR HOME CONFINEMENT

[ ] Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, _____, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of _____ months.

[ ] *[if voluntary reporting allowed]*[15] The defendant shall surrender to the Bureau of Prisons by reporting to the institution designated before 2:00 pm local time on _____. Defendant is advised it is a criminal offense, pursuant to 18 U.S.C. § 3146, if after having been released he fails to surrender for service of sentence pursuant to order of this court. If convicted of failure to appear, a defendant may be punished by fine, imprisonment or

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[15] Under 18 U.S.C. § 3143(b), the Court must detain a defendant who has been sentenced to a term of imprionment, and has filed an appeal, unless the Court finds by clear and convincing evidence that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released. In addition the Court must also find – in order to release defendant pending appeal – that any appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in (1) reversal, (2) an order for a new trial, (3) a sentence that does not include a term of imprisonment or (4) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

both. Any term of imprisonment imposed for failure to appear shall be consecutive to the sentence of imprisonment for this offense.

[ ] It is further ordered that the defendant continue to maintain telephone contact with the pretrial services office as previously ordered by this Court. This will include weekly telephone contact with the pretrial services office until such time the defendant voluntarily surrenders to the institution of designation.

FINE

[ ] That the defendant shall pay a fine in the amount of $_____. Payments shall be made in installments to commence 30 days after the date of judgment. Payments shall be due during the period of incarceration. During a period of supervised release, payment of any unpaid balance shall be a condition of supervision.

[ ] The Court finds that the defendant does not have the ability to pay interest. The Court will waive the interest requirement in this case.

Restitution[16]

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[16] For all crimes committed after April 24, 1996, the governing statute is the Mandatory Victims Restitution Act (MVRA) that makes restitution mandatory without regard to a defendant's economic situation. *See* 18 U.S.C. § 3664(f)(1)(A). The MVRA applies to convictions under Title 18. If the defendant is not charged with any crime under Title 18, restitution may still be ordered but it cannot be ordered to be paid immediately but must instead be ordered to be paid as a condition of supervised release; in the case of a long jail term, that could mean that payment of restitution would not begin for quite awhile. The burden of demonstrating the loss sustained by a victim is on the Government. *See* 18 U.S.C. § 3664(e). The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, is on the defendant. *Id.* There is a question whether non-charged relevant conduct can be used to compute the restitution owed. The Supreme Court interpreted the predecessor statute to the MVRA to mean that restitution may be awarded only for the loss caused by the specific conduct that is the basis for the offense of conviction. *See Hughey v. United States*, 495 U.S. 411 (1990). The MVRA appears to carry this forward by providing that restitution may be awarded for "the

[ ] The court finds that the victims have suffered injuries compensable under the [MVRA] [Victim and Witness Protection Act] in the amount of $_____. It is ordered that the defendant make restitution to the Clerk of the U.S. District Court, 550 W. Fort St. MSC 032, Boise Idaho 83724, except that no further payment shall be required after the sum of the amounts actually paid by all defendants has fully covered all the compensable injuries. Any payment made by the defendant shall be divided among the victims in proportion to their compensable injuries.

Special Assessment

[ ] It is further ordered that the Defendant shall pay to the United States a special assessment of $___ which shall be due immediately.

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amount of the loss sustained by each victim *as a result of the offense."* *See* 18 U.S.C. § 3663(B)(I)(1) (emphasis added). But at least one case has held that the MVRA allows restitution based on relevant conduct. *See U.S. v. Jennings* 2000 WL 32005 (7th Cir. 2000) (unpublished decision). However, this result grafts a Guideline concept – relevant conduct – onto a statutory provision, with no support in the statute itself for such a graft. The next issue is whether the Court should require immediate payment. This issue, unlike the issue of whether restitution is due at all, does require the Court to examine the finances of the defendant. Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to § 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of the following factors specified by § 3664(f): (A)The financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;(B) projected earnings and other income of the defendant; and (C) any financial obligations of the defendant; including obligations to dependents. A sentencing court can order "a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments." *See* 18 U.S.C.A. § 3664(f)(3)(A). A court also may order nominal periodic payments if "the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments." *See* 18 U.S.C. § 3664(f)(3)(B).

[ ] The Court finds that the defendant [does] [does not] pose a high risk of future substance abuse such that mandatory drug testing is [ordered] [waived] pursuant to 18 U.S.C. § [3563(a)(5)] [3583(d)].

SUPERVISED RELEASE OR PROBATION

[ ] Upon release from imprisonment, the Defendant shall be placed on supervised release for a term of ___ years. Within 72 hours of release from the custody of the Bureau of Prisons, the Defendant shall report in person to the probation office in the district to which the Defendant is released.

[ ] Supervised Release is imposed upon the following terms and conditions:

[ ] That the defendant shall not commit another federal, state, or local crime during the term of supervised release.

[ ] That the defendant shall comply with the rules and regulations of the Probation Department.

[ ] That the defendant shall perform ____ hours of community service as directed by the probation officer.

[ ] The defendant shall pay any fine, special assessment, or restitution that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release on a monthly payment schedule as directed by the probation officer.

[ ] The defendant shall provide the probation officer with access to any requested financial information. The defendant shall not incur any new indebtedness without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

[ ] That the defendant not possess a firearm or other dangerous weapon.

[ ] That the defendant shall submit to a search of his person, place of residence, or automobile at the direction of the U.S. Probation Officer and submit to seizure of any contraband found therein.

[ ] That the Defendant shall be place on home detention for a period of _____ months, to commence upon release from incarceration. During this time, the defendant shall remain at place of residence except for employment and other activities approved in advance by the probation officer. The defendant shall maintain a telephone at his place of residence without any special

services, modems, answering machines, or cordless telephones for the above period. The Defendant shall wear an electronic device and shall observe the rules specified by the Probation Department. The cost of electronic monitoring shall be paid by the Government.

[ ] That the defendant shall participate in a program of testing and treatment for drug abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer. The Defendant shall abstain from the use of any controlled substances. The cost of treatment and urinalysis shall be paid by both the Government and defendant in monthly payments as arranged by the probation officer.

[ ] That the defendant shall also comply with all general and specific terms of Supervised Release, and all Standard Conditions of Supervision, as outlined in the Judgment in a Criminal Case, to be filed by this Court.

[ ] Defendant is advised that if you violate the terms of your supervised release you may be brought before the court and a further sentence of incarceration may be imposed.

REASONS FOR SENTENCE

[ ] The Court has imposed this sentence for the following reasons:[insert reasons] [15]

--The Court finds that the sentence imposed reflects the nature, circumstances, and seriousness of the offense, and the history and characteristics of the defendant.

--Serious acts of criminal misconduct must be met with equally serious societal response.

--This sentence is within the range established under the sentencing guidelines for an offense carrying a combined offense level of _____ and a defendant with a criminal history category of ___.

--Those who act with a deliberate antisocial purpose in mind and become involved in illegal activities assume the risk that their actions will subject them to criminal liability.

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[15] In the 9th Circuit, the District Court is required to state its reasons for imposing a specific sentence in ALL cases. *U.S. v. Lockard,* 910 F.2d 542 (9th Cir. 1990). In certain cases, the Court must give DETAILED reasons, while in other cases only GENERAL reasons are required. *Id.* at 545-46. If the Guideline range (difference between maximum and minimum sentence) exceeds 24 months or if the Judge departs upward or downward, DETAILED REASONS are required. 18 U.S.C. §3553(c). A review of legally sufficient reasons can be found in Sentencing Guideline Handbook §9 at p. 736-38 (1995). Even if the range is less than 24 months and the Court is not departing upward or downward, the Court must still give GENERAL REASONS for imposing the sentence: "The district court should refer by section to the Guidelines upon which it relies, or expressly state that it is imposing a sentence in accordance with the Guidelines sections identified in the Presentence Report." *Lockard* at 546.

--The Court finds that this sentence was imposed after determining that there [were] [were not] aggravating or mitigating factors sufficient to warrant a departure from this guideline range.[16]

--The court finds that the sentence imposed is appropriate to ensure that the defendant does not revert to criminal activity upon his release from incarceration, and will deter the defendant and others from engaging in this type of criminal conduct in the future.

--Finally, this sentence was imposed only after taking into account any and all applicable specific offense characteristics provided for under the sentencing guidelines.

RIGHT TO APPEAL:

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[16] The 9th Circuit requires that the defendant get advance notice if the court is considering (1) departing upward; (2) denying the defendant the acceptance of responsibility reduction; (3) enhancing the sentence; or (4) running sentences consecutively rather than concurrently. *U.S. v. Brady*, 928 F.2d 844 (9th Cir. 1991), *overruled on other grounds, U.S. v. Watts*, 117 S.Ct. 633 (1997). The advance notice requirement is not satisfied merely because the relevant information is in the presentence report. *Id. at 847.* "Rather, such information either must be identified as a basis for departure in the presentence report, or, the court must advise the defendant that it is considering departure based on a particular factor and allow defense counsel an opportunity to comment." *Id.* The lesson here is to make sure the presentence report specifically discusses any of the 4 areas set out in *Brady* -- if not, the Court will have to give advance notice to defense counsel.

[ ] ***[if Defendant pled guilty]*** **Typically a defendant may appeal his/her conviction if he/she believes that his/her guilty plea was somehow unlawful or involuntary, or if there is some other fundamental defect in the proceedings that was not waived by the guilty plea. You also have a statutory right to appeal your conviction and sentence under certain circumstances, particularly if you think the sentence is contrary to law.** ***[However, a Defendant may waive those rights as part of a plea agreement, and you have entered into a plea agreement which waives some or all of your rights to appeal the [conviction] [and] [sentence itself]. Such waivers are generally enforceable, but if you believe the waiver is unenforceable, you can present that theory to the appellate court.*** [17] **With few exceptions, any notice of appeal must be filed within 10 days of judgment being entered in your case. If you are unable to pay the cost of an appeal, you may apply for leave to appeal in forma pauperis. If you so request, the Clerk of the Court will prepare and file a notice of appeal on your behalf.**

[ ] ***{if Defendant convicted by jury}*** **You are advised that you have a right to appeal this sentence, and that you have a period of ten days from today within which to file your notice of appeal with the clerk of this court. If you are unable to pay the cost of an appeal, you may apply for leave to appeal in forma pauperis. If you so request, the clerk of the court will prepare and file a notice of appeal on your behalf.**

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[17] The district court does not undermine the validity of a waiver of the right to appeal by informing the defendant that unenforceable waivers remain appealable. *U.S. v. Aguilar-Muniz*, 1998 WL 635469 (9th Cir. Sept. 17, 1998).

[ ] [if the Indictment contains a forfeiture count that the defendant is pleading guilty to, the Court must state that the property in Count ___ is deemed forfeited, and include such language in the J & C] [18]

[ ] [recommend that the Bureau of Prisons give the defendant credit for time served].

[ ] [any recommended placement or location for confinement?]

[ ] COUNSEL, IS THERE ANYTHING FURTHER?[19]

[ ] IF NOT, THEN COURT IS ADJOURNED.

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[18] The 9th Circuit remanded a case for resentencing when the Judge failed to verbally order forfeiture in the presence of a defendant. *U.S. v. Shannon, 1996 WL 341352 (9th Cir. 1996) (Unpublished).* In that case, the Defendant had agreed to forfeiture in a plea agreement which the Judge accepted. But the Judge failed to verbally order forfeiture when the Defendant was sentenced, although the forfeiture was put in the J&C. The 9th Circuit remanded for resentencing, holding that the verbal pronouncement of sentence -- including the forfeiture order -- had to be done in the presence of the defendant.

[19] Bring up everything in this hearing, because the District Court very quickly loses jurisdiction to make any changes to a sentence under Fed.R.Crim.P. 35. In *U.S. v. Aguirre, 2000 WL 776639 (9th Cir. June 19, 2000)*, the Judge amended the sentence within two days after it was imposed. Rule 35 allows changes within 7 days, so it appeared that the Judge acted timely. But the Circuit reversed the amendment, pointing out that amendments may only be done for arithmetical, technical, or other clear error. Clear error does not include a judge changing his or her mind. In this case, the Judge has lessened the sentence after realizing that the facility where the defendant would be confined would make it difficult for her to visit her minor son. The Circuit found that the judge had no jurisdiction to make such an amendment, which resulted from an afterthought rather than a clear error, according to the Circuit. Note also that this decision holds that the 7 days in Rule 35 begins to run from the date of oral pronouncement, not the date the Judgment is signed or filed.